July 2012 - Vermont Bar Examination

MODEL ANSWER - QUESTION 1 - July 2012

PLEASE NOTE: QUESTION 1 was a "Multistate Performance Test" (MPT) will not be answered here. Those model answers will be available on the NCBE's website www.ncbex.org at a later date.

MODEL ANSWER - QUESTION 2 – July 2012

PLEASE NOTE: QUESTION 2 was a "Multistate Performance Test" (MPT) will not be answered here. Those model answers will be available on the NCBE's website www.ncbex.org at a later date.

MODEL ANSWER - QUESTION 3 – July 2012

Part 1: The U.S. and Vermont Constitutions

The Establishment Clause of the First Amendment generally prohibits the government from endorsing any one religion. Article III of the Vermont Constitution prohibits the government from compelling support or attendance at "places of worship." The nativity scene represents a Christian message that features prominently in an important outdoor space owned by the Town. The question is to what extent each proposal is permitted by the First Amendment and the Vermont Constitution.

The U.S. Supreme Court has held that religious monuments and displays on public property may be constitutional depending on their history and context. *VanOrden v. Perry*, 545 U.S. 677 (2005) (Ten Commandments monument among others permissible); *Allegheny v. ACLU*, 492 U.S. 573 (1989) (lone crèche in courthouse erected by church violates Establishment Clause; Christmas tree and Menorah outside city building do not). The Court seems to have rejected the *Lemon* test for "passive" religious displays, (*VanOrden*), but used the *Lemon* test in analyzing crèches before (*Allegheny*; *Lynch v. Donnelly*, 465 U.S. 668 (1984)). To be consistent with the Establishment Clause, the *Lemon* test requires that the governmental action: (1) have a secular purpose; (2) have a principal effect that neither advances nor inhibits religion; and (3) does not foster "excessive government entanglement" with religion.

There is little case law construing Article III of the Vermont Constitution but, at least with respect to choosing a religious school when there is no local high school, the Vermont Supreme Court has held that Article III is more restrictive than the Establishment Clause. *Chittenden Town School District v. Department of Education*, 169 Vt. 310, 738 A.2d 539 (1999). At a minimum, the Vermont Supreme Court would be informed by U.S. Supreme Court First Amendment case law in interpreting Article III.

A. Doing nothing

It is helpful that the Town apparently uses no public funds to support the nativity scene. I would want to confirm this, including whether the Town uses public funds to pay for lighting the scene. On the

other hand, the fact that the Town organizes a caroling event in the same space (which likely involves a mix of religious and secular songs) may give rise to the further appearance of religious endorsement. I would also want to know whether other groups, religious or not, have asked to erect other displays and how the Town has responded.

Either way, I would counsel against doing nothing. Permitting the nativity scene to be displayed on the Town green without further context, and having it has the backdrop for the Town-organized caroling event, could lead observers to conclude that the Town has endorsed Christianity. The Town may argue the lighting serves a secular purpose of public safety, but this is not likely to be compelling given the seasonal nature of the display and the Town-organized caroling event.

B. The Disclaimer (or other sign alternatives)

Placing a sign near the nativity scene stating that the Town does not endorse any one religion will likely not shield the Town from liability. As long as just one religious symbol appears on the green, a court could conclude that the Town's actions are more significant than the words on the sign.

A better approach for a sign may be one that identifies who the nativity scene belongs to and recites its history. Depending on the facts, a sign documenting the display's 50-year history may help show a secular purpose. Shared history between the caroling event and the nativity scene would be important.

On the other hand, the seasonal nature of the nativity scene at Christmastime only and the fact that it depicts the birth of Christ make it religious in nature. Involvement by the sponsoring local businesses and volunteers with the caroling event could also weigh in favor of the predominately religious purpose of the display, assuming many of the carols are religious.

In addition, the Vermont Supreme Court may hold the Town to a higher standard under Article III than under the Establishment Clause. Ultimately, I would counsel against a sign, and look instead at opening the Town green to other symbols, or exploring an ordinance.

C. A menorah, Santa Claus, or other symbols

I would recommend adding other symbols if the Town wishes to keep the nativity scene. This could include other religious displays, such as a menorah, and secular symbols such as candy canes, snowmen, and a "Season's Greetings" sign. Santa Claus is a close call because, although he has come to represent the commercial side of the holiday season, he also has Christian origins and association with St. Nicholas and Christmas Day. But combined, a number of secular and non-Christian symbols would help off-set the religious nature of the nativity scene and support an argument that the entire display is for the secular purpose of celebrating the season. *See Lynch v. Donnelly*, 465 U.S. 668 (1984) (permitting Town-owned display involving numerous Christmas decorations, including a nativity scene, because purpose was to "celebrate the Holiday and to depict the origins of that Holiday"). Moreover, extending the day of removal to January 2 – which would encompass all the days of Hannakuh, Kwanza, and the secular celebration of New Year's Day – may fortify the association of the scene with the holiday season generally. If Pierre and/or local volunteer groups are not interested in erecting additional displays

themselves, I would have to address with the Selectboard issues of payment and resources for erecting and removing all displays. The point is to ensure the Town treats all of the displays equitably.

D. An ordinance banning all unattended displays, or all religious displays, on the Town green

As an alternative, I would also advise the Selectboard to consider an ordinance. An ordinance banning all unattended displays on the Town green most clearly distances the Town from the establishment or support of religion and is likely a reasonable content-neutral "time, place, manner" restriction on the use of the public space. Relevant considerations here are whether such an ordinance is appropriately tailored, i.e., whether it leaves open alternative channels for speech, and whether it is sufficiently clear to avoid being void for vagueness. The U.S. Supreme Court has held that content-neutral laws of general applicability do not violate individuals' right to the free exercise of religion.

The Town cannot ban only religious displays, however, as that would be a content-specific restriction on speech. The Town must treat religious and non-religious displays the same in both the text of the ordinance and in its enforcement.

Part 2. Lawsuit

Pierre would most likely bring a § 1983 claim to enforce his federal constitutional rights and a claim directly under Article III of the Vermont Constitution. His claim would likely be for declaratory and injunctive relief, as well as damages and, under his § 1983 claim, attorney's fees. He could bring his claims in either Vermont Superior Court or the U.S. District Court for the District of Vermont. The federal court would have discretion to assert supplemental jurisdiction over his state-law claim.

MODEL ANSWER - QUESTION 4 – July 2012

1. As a partnership engaged in a business, A&B Widgets must file an information return on Form 1065 (also known as Schedule K-1) showing its income, deductions, and other required information. (*See, e.g.*, IRS Publication 541, rev. Dec. 2010.) Schedule K-1 must show the names and addresses of each partner and each partner's distributive share of taxable income and must be signed by a general partner. In addition, Ann and Brad will need A&B Widget's Schedule K-1 in order to prepare their individual returns since the income distribution of the partnership passes through to Ann and Brad. As the fact pattern indicates, pursuant to their partnership agreement, Ann and Brad share income distribution equally.

2. (a) Ann

Tax Issues: It appears that Ann and Brad are trying to inflate the partnership's expenses for the current year in order to reduce the income it will report. Further, the e-mail suggests that Ann and Brad underreported the partnership's income for the prior tax year. Knowingly underreporting income is tax fraud. Regarding the 2010 tax year, Ann & Brad should file an amended Schedule K-1 for the

partnership. Further, Ann should file amended individual returns for 2010 because of the pass-through nature of partnership income. She could be subject to fines, penalties, audits and even criminal charges. Regarding the 2011 tax year, Ann should ensure that the partnership is filing an accurate Schedule K-1 and that she is filing accurate individual returns.

Professional Responsibility Issues: As a licensed attorney, Ann is subject to the Rules of Professional Conduct even for conduct committed outside the scope of her work as an attorney. Her e-mail suggests that she intends to misrepresent the partnership's expenses for 2011 and, further, that she and Brad misrepresented the partnership's expenses for the 2010 year.

A lawyer violates the Rules of Professional Conduct by filing a false income tax return. Knowingly filing a false income tax return implicates Rules 8.4(b) and 8.4(c) of the Vermont Rules of Professional Conduct in that it is a crime and necessarily includes conduct that involves dishonesty, deceit, misrepresentation, or fraud. Ann is subject to discipline if she filed or files a false income tax return. In addition, Vermont's attorney licensing statement includes a section in which lawyers certify that they are in good standing with respect to taxes owed to the State. If Ann certified that she was in good standing despite having knowledge that she had filed a false tax return, she may have committed professional misconduct when she filed her licensing statement.

(b) Brad

Tax Issues: Same as for Ann (see 2(a), above).

Professional Responsibility Issues: From the facts provided, it appears as if Brad is not an attorney or any other type of licensed professional. Therefore, other than his obligations as a citizen to truthfully comply with his tax obligations, there is no other issue raised by Ann's e-mail as to Brad.

(c) David

Tax Issues: Ann's e-mail does not raise any tax issues for David personally.

Professional Responsibility Issues: As a licensed attorney, David is subject to the Rules of Professional Conduct even for work he performs as an accountant. It is unclear whether Brad is a client of David's accounting business, David's law practice, or both. At a minimum, David has a duty to refrain from engaging in conduct that involves dishonesty, deceit, misrepresentation, or fraud. (*See* Vermont Rule of Professional Conduct 8.4(c).) Arguably, David would violate Rule 8.4(c) by knowingly preparing a false income tax return for Brad to file. Such conduct might also be a crime and, therefore, violate Rule 8.4(b) of the Rules of Professional Conduct.

If David is also Brad's lawyer (who happens to be preparing Brad's income tax returns), other duties attach as well. David is prohibited from counseling Brad to engage in conduct that David knows is criminal or fraudulent, or to assist Brad in committing such conduct. (*See* Vermont Rule of Professional Conduct 1.2(d).) Filing a false income tax return on Brad's behalf would appear to violate Rule 1.2(d). Of course, if Brad asks for advice as to agreeing to Ann's suggestion to "come up with expenses", David may discuss the legal consequences of such conduct. Rule 1.2(d). If Brad persists in asking David to file

income tax returns that David knows are fraudulent, David will have a duty to inform Brad that he cannot, Rule 1.4(a)(5), and, to the extent David is Brad's lawyer, to withdraw from representing Brad in connection with the filing of the income tax returns. (*See* Vermont Rule of Professional Conduct 1.16(c)(1) (lawyer must withdraw from representation if continued representation will result in a violation of the law or of the Rules of Professional Conduct).

Finally, the facts indicate that David has prepared Brad's tax returns for the past five years. They also suggest that Brad "came up" with "expenses" in 2010. If David determines that Brad used his services as an attorney to file fraudulent income tax returns, David will have to assess whether he has a duty to report Brad's conduct. In general, lawyers are prohibited from disclosing information related to a representation without the client's consent. (*See* Vermont Rule of Professional Conduct 1.6(a).) However, there are exceptions to the Rule. One exception requires an attorney to disclose information related to the representation in order "to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime of fraud furtherance of which the client has used or is using the lawyer's services." Vermont Rule of Professional Conduct 1.6(b)(3). Here, the facts do not indicate the amount of money, if any, that the partnership's fraudulent 2010 tax returns caused the federal and state government tos lose. David's duties under Rule 1.6(b)(3) will necessarily turn on whether the partnership's fraud caused "substantial injury to the financial interests" of the state and federal governments and was furthered by Brad's use of David's services as a lawyer. If so, he has a duty to disclose the fraud in order to rectify or mitigate the substantial injury.

Moreover, in Vermont, a lawyer has a duty to report professional misconduct committed by other lawyers. (*See* Vermont Rule of Professional Conduct 8.3.) The Rule applies whenever a lawyer "knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer . . . ." Vermont Rule of Professional Conduct 8.3(a). However, the Rule does not require a lawyer to report another attorney's misconduct when the information is "otherwise protected by Rule 1.6." Vermont Rule of Professional Conduct 8.3(c). David's knowledge of Ann's misconduct is protected by Rule 1.6 in that it is "related to the representation" of Brad and, under Rule 1.6, cannot be disclosed absent Brad's consent or unless one of the exceptions to Rule 1.6(a) is present. In other words, David does not have a duty to report Ann to the disciplinary authorities unless Brad consents to such a disclosure or unless Rule 1.6 requires David to disclose Brad's past crimes or frauds to the state and federal governments.

3. A "C" corporation is a separate taxable entity. If Ann and Brad were to convert their partnership to a C corporation, A&B Widgets would be required to file a corporate tax return (Form 1120) and pay taxes on its income at the corporate level. As shareholders of A&B Widgets, Ann and Brad would only have to pay A&B Widgets-related taxes if the company distributed corporate income, in the form of dividends, to its shareholders. Then, Ann and Brad would each be required to report that dividend income on their individual returns. This is often called "double taxation".

4. If A&B Widgets had been a C corporation at the time David received Ann's e-mail, it depends who is David's client is at the time to analyze his professional responsibilities.

If it is clear that Brad is David's client, then the analysis discussed in Answer 2(c) is applicable. However, if David is employed or retained by A&B Widgets, he represents the organization. (*See* Vermont Rule of Professional Conduct 1.13.)

In general, whenever an organization's lawyer knows that an officer, employee, or person associated with the organization intends to act in such a way that is reasonably certain to result in a violation of the organization's legal obligations, or a violation of law that might be imputed to the organization, the lawyer shall refer the matter to the highest authority within the organization that could act. (*See* Vermont Rule of Professional Conduct 1.13 (b).) Here, the facts suggest little choice for David in that there does not appear to be an authority within A&B Widgets that is higher than Ann and Brad. Thus, David must analyze his duties under Rule 1.13(c) of the Vermont Rules of Professional Conduct.

Generally, Rule 1.13(c) applies when either (i) the highest authority within an organization refuses to act to prevent an officer or employee from committing an act that is reasonably certain to result in harm that would require the organization's lawyer to make a disclosure required by Rule 1.6(b), or, (ii) the conduct is clearly a violation of law and is likely to result in substantial injury to the organization. If David determines that he must disclose Ann and Brad's refusal to refrain from filing a false income tax return, or the past filing of fraudulent returns, he must limit his disclosure to the extent he reasonably believes is necessary to prevent substantial injury to A&B Widgets.

Finally, David may also have an obligation to report Ann for professional misconduct. (*See* Vermont Rule of Professional Conduct 8.3.)

MODEL ANSWER - QUESTION 5 – July 2012

1. Was the Court correct in denying defense counsel's Brady motion for the failure of the prosecutor to produce a copy of the 911 call? Discuss.

Both as a matter of due process of law, see Brady v. Maryland, 373 U.S. 83, 86-88 (1963), and under Vermont's discovery rules, see V.R.Cr.P. 16(b)(2), the prosecution has an obligation to disclose to the defense any exculpatory material within its possession or control. With regards to the destruction of possibly exculpatory evidence, the issue is ordinarily controlled under the Fourteenth Amendment by the Supreme Court decision in Arizona v. Youngblood, 488 U.S. 51, 58 (1988). Youngblood holds that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." Id. at 58. Vermont, however, has adopted a different standard under the Vermont Constitution, Chapter I, Article 10. First, the defendant must show a "reasonable possibility" that the lost evidence would have been favorable. State v. Bailey, 144 Vt. 86, 94, 475 A.2d 1045, 1050 (1984). If the defendant makes the requisite showing, the court must perform "a pragmatic balancing" of three factors: (1) the degree of negligence or bad faith on the part of the government; (2) the importance of the evidence lost; and (3) other evidence of guilt adduced at trial. Id. at 95, 475 A.2d at 1050.

The Court's ruling here was correct. First, nothing suggests that there is a reasonable probability that the lost evidence would have been favorable. Second, even if this showing could be made, the degree of negligence or bad faith on the part of the police was minimal and the evidence was not very important, as the defense could have called the Dispatcher to testify as to what she heard.

2. Was the Court correct in allowing the prosecutor to elicit from Dispatcher the statements overheard during the 911 call? Discuss.

Under V.R.E. 801, hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Hearsay is inadmissible under V.R.E. 802 unless a hearsay exception applies or if the statement could be considered non-hearsay.

Here, it could be argued that both Dick and Jane's statements are admissible on the grounds that they are not hearsay. These statements are commands, and the prosecutor is offering them to show the context of event rather than for the truth of any assertions.

To the extent these statements, especially Jane's, contain implicit assertions, the statements would still be admissible under the excited utterance exception of V.R.E. 803(2). Rule 803(2) defines an excited utterance as a statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The rationale behind this exception is "that a person's powers of reflection and fabrication will be suspended when she is subject to the excitement of a startling event, and any utterances she makes will be spontaneous and trustworthy." State v. Lemay, 2006 VT 76, ¶ 9, 180 Vt. 133, 908 A.2d 430. In this case, both Dick and Jane's statements relate to the assault and were made during the assault, while under the stress of excitement caused by the assault. Thus, 803(2) is satisfied here and the Court was correct in admitting this evidence.

It should also be noted that these statements are not excluded by the rule in Crawford v. Washington, 541 U.S. 36 (2004), that the admission of testimonial hearsay violates the Confrontation Clause rights of a criminal defendant unless the declarant is available or the defendant had adequate prior opportunity to cross-examine the declarant. The statements here are non-testimonial, mainly because they were not made to the police or in response to police questioning.

3. Were the Court's two rulings with regard to Jane's written statement correct? Discuss.

The Court's first ruling regarding Jane's written statement was correct. The statement is not admissible because it is hearsay under V.R.E. 801, as an out-of-court statement offered to prove the truth of the matter asserted. Under V.R.E. 802, hearsay is inadmissible. No hearsay exception applies.

NOTE: The fact that the statement is sworn does not change the analysis: the rule providing that certain statements given under oath are not hearsay, V.R.E. 801(d)(1), only applies to statements given at a trial, hearing, or other proceeding, or in a deposition, where the declarant could have been previously cross-examined.

The Court's second ruling, however, was incorrect. Although the statement is hearsay, it is still admissible for impeachment purposes, as a prior inconsistent statement. NOTE: The statement only comes in for impeachment purposes, not to prove the truth of the matters asserted.

4. Was the Court correct in ruling that the prosecutor could elicit from Tom testimony regarding prior assaults? Discuss.

The first question to be answered here is, Is this evidence admissible? The admissibility of this evidence depends upon whether it is relevant and whether it is excludable by V.R.E. 404(b) as inadmissible prior bad act evidence. The analysis is generally the same under both, but 404(b) provides the specific analysis applicable here. Under V.R.E. 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith, although it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In a line of cases following State v. Sanders, 168 Vt. 60, 716 A.2d 11 (1998), the Vermont Supreme Court has ruled that evidence of a defendant's prior uncharged bad acts in domestic assault prosecution, namely evidence of prior incidents of domestic abuse to complainant, may be admissible. Specifically, it can be relevant to the nature of the parties' relationship and can explain what might otherwise appear to be incongruous behavior to jury, such as remaining with an abusive partner, delaying report of abuse, or recanting prior claims of abuse.

Here, the prior assaults would arguably be admissible under 404(b), as they provide a context to the relationship and help to explain why Jane recanted while testifying. For the same reasons, the prior assaults would be relevant.

Even if admissible, however, the evidence must pass the test of V.R.E. 403, which requires that the probative value of the evidence outweigh its prejudicial nature. Here, this could be argued either way. In support of admissible are the facts that the prior assaults are close in time to the charged crime, they are by the same perpetrator on the same victim, and are less egregious than the charged crime. On the other hand, the number of the prior assaults could be too prejudicial, and Tom's testimony could dominate the trial.

MODEL ANSWER - QUESTION 6 – July 2012

1. The 2005 will has been revoked if the 2010 will is valid. A will can be revoked explicitly or by implication. Revocation by implication occurs if a party executes another will that disposes of all of the testator's property. Vt. Stat. Ann. tit. 14, § 11; In re Peck's Estate, 101 Vt. 502, 508, 144 A. 686, 688 (1929). Dan's 2010 will disposes of all of his property. If it is valid, it revokes the 2005 will by operation of law, even though the 2010 will does not explicitly revoke the 2005 will.

   Dan's 2010 will appears to be valid. Vermont law requires that a will must be signed in the presence of at least two witnesses who attest to the signing of the will in the presence of each other. Vt. Stat. Ann. Tit. 14, § 5. A testator must have testamentary capacity at the time of making the will. Vermont law defines the following standard for testamentary capacity:

> the test for testamentary capacity is "whether the testator had sufficient mind and memory at the time of making the will to remember who were the natural objects of his bounty, recall to mind his property, and dispose of it understandingly according to some plan formed in his mind." *In re Estate of Burt,* 122 Vt. 260, 263, 169 A.2d 32, 34 (1961).

quoted in Landmark Trust v. Goodhue, 172 Vt. 515, 518-19, 728 A.2d 1219, 1224 (2001).

Dan's testamentary capacity is measured at the time he makes the will. The facts establish that he could recognize his family—the natural objects of his bounty. He had sufficient capacity to work with a stamp collection, an exercise requiring significant intellectual capacity. His will itself documents that he could recall his property and form a plan for disposing of his property. Thus, it appears that Dan had the requisite testamentary capacity, and that his 2010 will is valid.

The other potential concern with the 2010 will is that Samantha is a witness. Her participation as a witness, however, does not affect the validity of the will. Vermont law provides that if a person who is not an heir at law serves as a witness, the will is still valid. The bequest to the witness becomes void, unless there are three other competent witnesses. Vt. Stat. Ann., Tit. 14, § 10. In this case, Samantha's participation does not affect the validity of the will or the bequest to Samantha's.

2. Allen and Bob may challenge the will on the grounds that Dan lacked testamentary capacity, which was analyzed in the discussion in the answer to question 1. Allen and Bob may also assert that the will is the product of undue influence because the will was produced under suspicious circumstances. The Vermont Supreme Court has described the standard for such claims as follows:

> A will should not be enforced, however, if it is shown to be the product of undue influence. "The doctrine of undue influence is applicable when a testator's free will is destroyed and, as a result, the testator does something contrary to his 'true' desires." *In re Estate of Rotax,* 139 Vt. 390, 392, 429 A.2d 1304, 1305 (1981). The burden to prove undue influence is normally placed on those contesting the will. *Id.* That is, the will is presumed proper and enforceable unless its contestants demonstrate sufficient evidence of undue influence.
>
> The burden of proof, however, shifts to the proponent of the will " 'when the circumstances connected with the execution of the will are such as the law regards with suspicion.' " *Id.* (quoting *In re Collins's Will,* 114 Vt. 523, 533, 49 A.2d 111, 117 (1946)); *In re Estate of Laitinen,* 145 Vt. 153, 159, 483 A.2d 265, 269 (1984). If such circumstances are present, the will is presumed to be the product of undue influence, and it will not be enforced unless the proponent persuades the trier of fact that no undue influence attended the execution of the will. *In re Moxley's Will,* 103 Vt. 100, 112, 152 A. 713, 717 (1930). See generally Reporter's Notes, V.R.E. 301, at 326-27 (discussing presumptions that shift the burden of persuasion, known as "Morgan rule" presumptions).

In re Estate of Raedel, 152 Vt. 478, 481-82, 568 A.2d 331, 332-33 (1989).

The fact pattern does not provide sufficient evidence to establish suspicious circumstances.

> Suspicious circumstances can be found when there is a fiduciary relationship between the testator and the beneficiary. *Raedel,* 152 Vt. at 483, 568 A.2d at 334. Suspicious circumstances may also be present "where a relationship of trust and confidence obtains between the testator and the beneficiary, or where the latter has gained an influence or ascendency over the former." *Collins,* 114 Vt. at 533, 49 A.2d at 117. If such a scenario arises, "the will is presumed to be the product of undue influence, and it will not be enforced unless the proponent persuades the trier of fact that no undue influence attended the execution of the will." *Raedel,* 152 Vt. at 481-82, 568 A.2d at 333.

Eckstein v. Estate of Dunn, 174 Vt. 575, 816 A.2d 494 (2002).

The question is not the disposition of the estate; it is the circumstances that preceded the will. There is no evidence that Samantha played any role in the production of the will. The only evidence cited in the fact pattern is that Samantha was a witness and that she spent time with Dan enjoying their stamp collections. This evidence is insufficient to establish suspicious circumstances. Allen and Bob would bear the burden of proving undue influence. Under the facts given, they would be unable to meet that burden.

3. In addition to the claims made by Allen and Bob, Wilma can make a claim against the estate as a surviving spouse. Section 319 of Title 14, Vermont Statutes Annotated, provides:

> (a) A surviving spouse may waive the provisions of the decedent's will and in lieu thereof elect to take one-half of the balance of the estate, after the payment of claims and expenses.
>
> (b) The surviving spouse must be living at the time this election is made. If the surviving spouse is mentally disabled and cannot make the election personally, a guardian or attorney in fact under a valid durable power of attorney may do so.

Wilma can exercise her rights under this provision to claim one-half of the estate, after the payments of claims and expenses, by filing an election in the probate court. In addition, Wilma may have the right to up to $125,000.00 of the value of the homestead of Dan under 27 V.S.A. § 105. Wilma may request that the probate court award her household goods and furnishings under 14 V.S.A. § 312. Finally, Wilma may request an allowance for her support while the probate case is being resolved under 14 V.S.A. § 316.